SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-1007

NO. ------

REGENCY REALTY, ET AL.,

Petitioners,

V.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered August 10, 1971, and denial of a timely petition for rehearing entered in this proceeding on September 10, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit and the denial of petition for rehearing (Docket Nos. 71-1022 — 71-1038) have not yet been reported but are appended hereto (Appendix B and C, *infra*, pp. 1a-2a).

The order of the Tax Court denying Petitioners' motions to vacate and extend time (Appendix A, *infra*, 1a) was not reported.

JURISDICTION

The judgment of the Court below (App. 1a) was entered on August 10, 1971. A timely petition for rehearing was denied on September 10, 1971 (App. 2a). The jurisdiction of this court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

In 1966, the President of seventeen corporations hired counsel to represent him in proceedings taken by the Commissioner of Internal Revenue to recover certain tax deficiencies. A claim of $150,000 was accepted by the Government and was the basis for seventeen stipulated decisions in the Tax Court. However, when Petitioner received his tax bill, an additional $38,000 interest was included which amount he claimed was never disclosed to him by his attorneys. Represented by new counsel, a motion was filed to vacate the stipulated decisions. At the hearing on the motion the former attorneys testified that Petitioner knew that his offer of settlement would not include interest. The questions presented here relate to the admissibility into evidence of the testimony of the former attorneys. The questions are

a. Whether the Tax Court should have looked to the law of the District of Columbia in ruling on the objection to the admissibility of evidence based on the attorney-client privilege.

b. Whether petitioners' Fifth Amendment right to due process of law was denied by the failure of the Tax Court and the Fourth Circuit Court of Appeals to follow the law of the attorney-client privilege as reported in cases of the Second and Ninth Circuits.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in relevant part that "No person shall be . . . deprived of life, liberty or property without due process of law."

STATUTES INVOLVED

Tax Court Rule 31. Evidence and the Submission of Evidence.

"(a) Rules Applicable — The trials before the Court and its Divisions will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia."

Fed. R. Civ. Rule 13(a). Review of Decisions of the Tax Court.

"(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the Tax Court of the United States shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later."

Fed. R. Civ. Proc. Rule 43. Evidence.

"(a) Form and Admissibility — In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of

evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held."

18 U.S.C. §208. Acts affecting a personal financial interest.

"(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such

officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services."

STATEMENT OF THE FACTS

Petitioners are seventeen corporations of which Milton Kirsner is the President. Respondent is the Commissioner of Internal Revenue. The Commissioner had determined deficiencies in the amount of $346,399.82 with respect to the seventeen corporations involved in this appeal and notified taxpayer that if he wished to challenge the determination it would be necessary to file a petition within 90 days. Kirsner retained Arnold Fleischmann to represent him in the matter. Fleischmann later brought Samuel Silber into the case as co-counsel.

Kirsner offered a proposal of $150,000 as full settlement of all taxes and penalties. This offer was accepted by the Government and was the basis for seventeen stipulated decisions entered in the Tax Court of the United States, which may have not been ordered signed by the U. S. Attorney. However, over a period exceeding thirty days, Kirsner received bills which totaled a sum in excess of $188,000. The difference in amount was due to an added interest factor on the amount of the bills. Kirsner agreeing only to a settlement of $150,000 suggested an appeal of the decision but his counsel refused to represent him. No orders of satisfaction were filed.

Petitioner determined to exercise his right of appeal and retained Felix S. Jacob, who on September 29, 1969, filed a Motion for Leave to File Motion to Vacate Decision, a Motion to Vacate Decision, and a Motion to Extend Time to File Petition. The basis for appellant's motion for leave

to file a motion to vacate decision was Rule 18 of the Tax Court. Appellant contended in support of his motion that Kirsner had received tax bills after 30 days from the Order of the Court which amounted to a sum in excess of $188,000.00 after his offer of $150,000.00 had been accepted. Appellant alleged that this major variation was never explained to him. In addition, Appellant alleged that he had retained new counsel. This was difficult and took considerable time, inasmuch as he was handicapped by being under the care of physicians for mental problems and a tumor. Appellant further alleged in his motion that he was advised by new counsel that the 150% declining balance depreciation method was available in all open years and that after 30 days from July 1, 1969, the Commissioner of Internal Revenue announced that it would not pursue any more appeals attacking the entity of medical corporations and this new decision would be a material factor in all of these 17 cases which involve a similar attack of the corporate entity.

On October 20, 1969, subsequent to their filing suit against the Appellants and Kirsner for services rendered in this matter, Fleischmann and Silber filed a Motion under Rule 24(b) for leave to withdraw appearance of counsel which was granted by an Order dated November 19, 1969.

A hearing was held on the motions on October 22, 1969, which resulted in an order of continuance. On November 19, 1969, a hearing was held before Judge Sterrett on the motions. At the hearing, Appellees contended that the Court lacked jurisdiction to hear the motions. Appellees noted that under Section 7481 a decision becomes final upon the expiration of time for filing a review. Under Section 7483, this time period is established to be 90 days. Appellees also asserted that under Rule 19F the statutory time period to file a motion to vacate was 30 days. In addition, Appel-

lees contend that the interest factor was fully explained to the taxpayer, including the fact that the settlement did not include interest. To establish this later point, Appellees obtained testimony from Appellants' prior attorneys, Fleischmann and Silber.

The case was held under advisement by the Court. On August 24, 1970, Judge Sterrett signed the order from which this appeal is taken denying Appellants' motion for leave to file a motion to vacate decision and motion to extend time to file petition for review.

It should be noted that at the time Fleischmann and Silber were called to testify for the Government, they had suits pending in the Maryland courts for the recovery of $38,000 in fees based on 15% of the difference between the original assessment and the actual judgment. Federal regulations (Title 31 C.F.R. §10.28) provide that no attorney, C.P.A., or enrolled agent shall charge an unconscionable fee for representation of a client in any matter before the Internal Revenue Service. The Tax Court denied petitioners motion for leave to file a motion to vacate decision and motion to extend time to file petition for review. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit on various grounds, including the impropriety of the testimony of Kirsner's former counsel on the basis of the attorney-client privilege. In its Opinion dated August 10, 1971, the Court of Appeals affirmed the denial of petitioners motions. Timely petition for re-hearing was denied September 10, 1971. From that judgment this writ is prayed.

REASONS FOR GRANTING CERTIORARI

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER FEDERAL COURTS SHOULD APPLY STATE OR FEDERAL LAW IN FEDERAL TAX INVESTIGATIONS AND HAD THE TAX COURT APPLIED THE LAW OF THE DISTRICT OF COLUMBIA, THE TESTIMONY OF THE FORMER ATTORNEYS MAY HAVE BEEN EXCLUDED.

Petitioners urge that the Tax Court in ruling on the admissibility of evidence offered by the former attorneys should have looked to the law of the forum. This position is consonant with that of the Ninth Circuit as enunciated in *Baird v. Koerner*, 279 F. 2d 623 (9th Cir. 1960). In *Baird*, an attorney refused to identify his clients to a revenue agent on the ground that the communications to him from the accountants of the clients whose names had not been revealed to him were privileged. The revenue agent thereupon filed a petition in the District Court to enforce the summons and when the attorney continued to refuse to answer he was found guilty of civil contempt. Reversing the judgment of the lower court insofar as it ordered the attorney to reveal any information regarding the persons who employed him, the Court of Appeals held that the scope of the attorney-client privilege, being an incident of the power of the State to create attorneys was governed by state law and that under California law of privilege which protects disclosure of clients identity, the attorney did not have to give the requested information.

If the Tax Court applied the laws of the District of Columbia in ruling on the objected evidence, the testimony of former counsel would have been excluded. The rule of attorney-client privilege in the District of Columbia was laid down in *Elliott v. U. S.*, 23 App. D.C., 456 (1904). Elliott, an attorney, was summoned as a witness to testify

in the trial of a contested will. He was called by the caveatees and was asked what the testator had said to him about a will. The attorney testified that one day the testator asked him where he had been, to which the attorney responded "I have just been up to make . . . gentleman's will". The testator then stated "that reminds me I want to have mine fixed." On cross examination defense counsel asked the identity of the person for whom the attorney prepared the will which Elliott declined to answer on the basis of privilege and was held in contempt. On appeal the court reversed, stating:

> "Professional communications made by the client to the attorney are upon principles of public policy and from the necessity of preserving confidence in all matters of business where the assistance of an attorney is required are privileged from disclosure and this privilege is that of the client rather than the attorney. The privilege embraces *all* communications made by the client to his attorney for and in the course of business for which the attorney may be employed. The attorney cannot be permitted to disclose such communications whether in the form of papers delivered or statements made."

Petitioners emphatically contend that in ruling on the objectionable testimony the Tax Court was obliged to look to this rule and make a determination as would the highest court of the District of Columbia. As was pointed out by this very Court in *Hormel v. Helvering*, 312 U.S. 552 (1941),

> "rules of practice and procedure are devised to promote the ends of justice, not defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy."

Therefore, where injustice might otherwise result a reviewing court may consider questions of law not pressed

below. Clearly, if the Tax Court applied the wrong law in ruling on the objectionable testimony, grave injustice to petitioner would result. Therefore, in passing on this petition, we pray the Court to consider this argument.

II.

DECISIONS OF OTHER COURTS OF APPEALS HAVE REFUSED TO ALLOW AN ATTORNEY TO TESTIFY AS TO KNOWLEDGE RECEIVED FROM HIS CLIENT WHILE THE RELATIONSHIP OF ATTORNEY-CLIENT EXISTED.

Petitioners contend that the testimony of former counsel should have been excluded. This is in accord with decisions by the Second and Ninth Circuits. In *Republic Gear Co. v. Borg Warner*, 381 F. 2d 551 (2nd Cir. 1967), plaintiff brought a diversity action against defendant for tortious interference with contract relations plaintiff had with two Brazilian corporations. Plaintiff sought the deposition of the attorney who had represented the Brazilian corporations at the time they suspended contract relations with plaintiff claiming that the desired documents would reveal that the foreign corporation ceased relations with plaintiff because of inducements by defendant. The attorney refused to produce certain documents claimed to be within the attorney-client privilege and hence excusable from depositional examination. It should be noted that the attorney was no longer representing the clients whose documents he was seeking to protect nor did these former clients request him to claim the privilege, thereby "opening the door" by not complying with the federal common law rule which states that "the privilege applied only if . . . it has been claimed by the client." See *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950). However, the court held that the documents were within the privilege and immune from discovery.

The decision below also conflicts in principal with *Baldwin v. Commissioner of Internal Revenue*, 125 F. 2d 817 (9th Cir. 1942). In this case the decedent mother expressed to her attorney the desire to have certain property go to her son. The witness suggested a method which would save the expense of the administration at her death. However, the Internal Revenue claimed that the transfer was intended to take effect in possession for enjoyment at or after death and therefore taxable. In an attempt to prove this, the government called the attorney as witness and asked questions which were objected to on the basis of privilege. The objections were overruled. The Ninth Circuit reversed and held that the information sought was privileged. It is significant to note that the court upheld the privilege despite the fact that the door was opened by the son's presence at certain discussions between the attorney and the mother, which is contrary to the accepted rule that a communication is not confidential if in the presence of a third person, not the agent of either the client or attorney.

III.

PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT WERE ABRIDGED BY THE PROCEEDINGS IN THE TAX COURT.

Petitioner asserts that his constitutional right to due process of law under the Fifth Amendment was violated by the Tax Court proceedings. The Fifth Amendment provides that no person shall "be deprived of life, liberty or property without due process of law". Inherent in this phrase is the guarantee of a fair trial in a fair tribunal. *American Cyanamid v. F.T.C.*, 363 F. 2d 757 (6th Cir. 1966). The circumstances in the Tax Court clearly deprived petitioner of the requisite fair and equitable proceedings.

Initially, the Trial Judge allowed the testimony of petitioners two prior attorneys — a breach of the confidential attorney-client relationship in derogation of evidentiary rules to such a shocking extent that it violated a Constitutional right. See *Rochin v. California*, 342 U.S. 165 (1952). Here the two prior attorneys in another action had sued petitioner for fees based upon 15% of the difference between the original assessment and the actual judgment, which may be in violation of 18 U.S.C. §208. The success of the Government in preserving the judgments had a direct bearing on the success of the prior attorneys in collecting their fee and takes them out of the realm of a neutral impartial onlooker and casts them as stakeholders along with the Government in proving there was no mistake of fact and that Kirsner knew and anticipated the enormous amount of interest. This factor added to the initial taint of the attorney-client relationship should have been enough to exclude the evidence. Other factors lend support to this argument. The testimony of the attorneys admits that Kirsner was under medical care during the period of negotiations. It hardly seems equitable that one should be deprived of property in a situation where he signed stipulated decisions while suffering from mental and physical illness and in ignorance of the fact that the tax bill would be more than 25% greater than the agreed sum.

In *Smyth v. United States*, 92 F. 2d 900 (10th Cir. 1937), a suit by the Government to recover an erroneous tax refund, the parties stipulated, after judgment for the Government, that no appeal would be taken. The Government thereafter sought a rehearing on the ground that the court had erred in not allowing interest, as required by statute, from the date of the original refund payment. The court held the Government bound by the stipulation for settle-

ment made by the attorneys empowered to represent it in court.

The Trial Judge heard the case in the Tax Court, sitting in Washington, D.C., on November 19, 1969, but refused to admit into evidence a medical report from Dr. Philip Lerner, a Baltimore psychiatrist, now deceased. This letter was taken at his deathbed and concerned some of the emotional problems of Mr. Kirsner. The rules of the Tax Court discourage pre-trial depositions and encourage stipulation of the material facts. Then the Trial Judge over 9 months later, on August 24, 1970, denied all of Petitioners' motions.

However, we strongly urge that looking at the totality of circumstances, the admission of questionable evidence, the fact that prior counsel were financial stakeholders with a contingent fee interest, and Kirsner's mental and physical incapacity, the Tax Court proceedings violated petitioner's Fifth Amendment constitutional right and, therefore, the cause should be remanded. In addition, the Orders of the Tax Court were illegal in that the Tax Court is without jurisdiction to impose interest on a taxpayer and to enter a settlement. Tax claims are settled by Internal Revenue Service alone in the Tax Court, where the Service represents the Government, and in other cases, only prior to reference of the claim to the Department of Justice for litigation. 26 U.S.C. §7122.

CONCLUSION

Petitioners do not seek to evade the payment of tax deficiencies as has been claimed by the Government. Rather, they seek a fair trial on the merits or a reversal. The opinion of the Fourth Circuit was "The Motion was not filed until 88 days after decision. Ordinarily a motion to vacate should be filed within 30 days." Rule 19 of the Tax Court allows 90 days to file a motion for leave to file

a motion to vacate a decision. There were not ordinary circumstances here and taxpayers did file within the 90 days allowed under Rule 19 of the Tax Court and Rule 13a of the Federal Rules of Appellate Procedure. Certainly, it was a serious abuse of discretion to deny Taxpayers' motions when the Tax Court judge did not follow basic rules of evidence, as per the cited Second and Ninth Circuit decisions, and so denied Taxpayers' fundamental constitutional rights to a fair trial. In *Smyth*, it was held that interest may be waived. Here, Taxpayers have made the same contention and have had their assets attached pending this appeal. The attorney-client privilege is too basic to our American system of justice to be disregarded. The granting of this petition for a writ of certiorari would be a first step in obtaining a fair trial on the merits or a reversal, and therefore pray that it be granted.

Respectfully submitted,

FELIX S. JACOB,

Attorney for Petitioners.

APPENDIX A

ORDER OF TAX COURT OF UNITED STATES

After due consideration Petitioners' Motion For Leave To File A Motion To Vacate Decision and Petitioners' Motion To Extend Time To File Petition For Review are hereby Denied.

/s/ SAMUEL B. STERRETT,
Judge

Dated: Washington, D.C.
August 24, 1970.

APPENDIX B

United States Court of Appeals
For The Fourth Circuit

Nos. 71-1044 — 71-1038

Regency Realty, et al.,
Appellants,

versus

Commissioner of Internal Revenue,
Appellee.

Appeal from the Tax Court of the United States, Samuel B. Sterrett, Judge.

Argued June 8, 1971 Decided August 10, 1971

Before Haynsworth, Chief Judge and Bryan and Craven, Circuit Judges.

Felix S. Jacob (Bertram M. Goldstein on brief) for Appellant in No. 71-1022 thru 71-1038; and Mary J. McGinn Attorney, Tax Division, Department of Justice, (Johnnie M. Walters, Assistant Attorney General, Meyer Rothwacks, Grant W. Wiprad, Attorneys, Department of Justice, on brief) for Appellee in Nos. 71-1022 thru 71-1038.

Per Curiam:

This is an appeal from the refusal of the Tax Court to grant a motion for leave to file a motion to vacate a prior decision of the Tax Court.* Finding no abuse of discretion, we think the denial of the motion should be

AFFIRMED

APPENDIX C

United States Court of Appeals
For The Fourth Circuit

Nos. 71-1022 — 71-1038

Regency Realty, et al.,

Appellants,

versus

Commissioner of Internal Revenue,

Appellee.

Appeals from the Tax Court of the United States.

ORDER

(Filed September 10, 1971)

With the concurrence of Judge Haynsworth and Judge Bryan, the petition of appellants for rehearing is denied.

For The Court

BRAXTON CRAVEN,
United States Circuit Judge.

A True Copy Test:

SAMUEL W. PHILLIPS, Clerk,
by DIANE BURKE,
Deputy Clerk.

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* The motion was not filed until 88 days after decision. Ordinarily a motion to vacate should be filed within 30 days.

APPENDIX D

Supreme Court of the United States
No. A-575 October Term, 1971

Regency Realty, Inc., et al.,
Petitioners,
v.
Commissioner of Internal Revenue

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 7, 1972.

/s/ WARREN E. BURGER,
Chief Justice of the United States.

Dated this 6 day of December, 1971.

Supreme Court, U. S.
FILED
MAR 30 1972
MICHAEL RODAK, JR., CLERK

No. 71-1007

In the Supreme Court of the United States

OCTOBER TERM, 1971

REGENCY REALTY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1007

REGENCY REALITY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Tax Court denied petitioners' motions without filing an opinion. The opinion of the court of appeals (Pet. App. B 1a–2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1971. A petition for rehearing was denied on September 10, 1971 (Pet. App. C 2a). By order dated December 6, 1971, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 7, 1972 (Pet. App. D 3a). The petition was filed on February 7, 1972. The juris-

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diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Tax Court had jurisdiction to entertain petitioners' motions for leave to file motions to vacate decisions, and, if so, whether the court abused its discretion in denying the motions.

STATUTES AND RULES INVOLVED

The pertinent provisions of Sections 7481 and 7483 of the Internal Revenue Code of 1954, of Rule 13 of the Federal Rules of Appellate Procedure, and of Rules 19(f) and 31 of the Tax Court's Rules of Practice are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

Petitioners are 17 related corporations of which Milton Kirsner is president. The Commissioner determined deficiencies and penalties against petitioners totalling approximately $346,000 for taxable years from 1958 through 1964. On July 9, 1968, petitions were filed in the Tax Court by their attorneys, Arnold Fleishmann and Samuel L. Silber, who had been retained by Mr. Kirsner. Both before and after the petitions were filed, Messrs. Fleishmann and Silber engaged in settlement negotiations with representatives of the Internal Revenue Service. (Pet. 5; R. 1–13, 111–115.) [1]

[1] "R." references are to the separately bound record appendix in the court of appeals, a copy of which we have lodged with the Clerk of this Court. The pleadings relating to Regency Realty, Inc. are set forth in that appendix (pp. 1–23) as representative of the pleadings relating to all 17 corporations.

By letter dated May 14, 1969, Mr. Kirsner offered on petitioners' behalf (R. 49) $150,000 "in full settlement of all taxes and penalties for the taxable years involved in the pending litigation." On July 1, 1969, stipulated decisions were entered in petitioners' 17 cases requiring payment of a total of $150,000 in taxes and penalties. In each of these decisions it was stipulated, over Kirsner's signature, that "petitioner waives the restrictions, if any, contained in the applicable Internal Revenue laws on the assessment and collection of the deficiency in tax and addition to the tax, *plus statutory interest*." (Emphasis supplied.) (R. 25–47.)

About August 1, 1969, petitioners received statements for a total of $150,000 in taxes and penalties, plus approximately $38,000 in statutory interest (R. 48). On September 29, 1969, 90 days after the stipulated decisions had been entered, new counsel for petitioners filed motions for leave to file motions to vacate the decisions, and motions to extend petitioners' time for appeal (R. 48–53). At a hearing on the motions on November 19, 1969, Kirsner testified that his former attorneys had not explained the interest factor to him when he signed the stipulations; that he was in disagreement with them generally over the terms of settlement; and that he executed the decisions "under duress" (R. 78–80). He also testified that during 1969 he received medical care for a tumor (R. 74, 77); that he had been seeing a psychiatrist about every three weeks since World War II (R. 74, 83); and that he had had difficulty in retaining new counsel after the

stipulated decisions were entered and the tax bills rendered (R. 75–77).

The Tax Court ruled that Kirsner, by his testimony, had waived the attorney-client privilege as to his former counsel (R. 84). Mr. Silber, Mr. Fleishmann and an associate testified that Kirsner had been advised that interest would be due on any deficiency agreed to in the settlement, and that at no time did Kirsner express any displeasure with the settlement by reason of the inclusion of interest (R. 86, 88, 99, 102). Mr. Silber further testified (R. 88) that he and former co-counsel were suing Kirsner for fees "based on the saving of taxes and penalties as well as interest."

Counsel for the Commissioner urged primarily that the stipulated decisions had become final prior to the hearing, and that the court was without jurisdiction to entertain petitioners' motions (R. 65–68). The court did not pass on the jurisdictional question, but indicated that it would deny the motions on the merits because there was no showing that Kirsner's medical and mental problems had affected his understanding of the settlement, or that he had executed the stipulated decisions under duress (R. 107). On August 24, 1970, the court denied the motions. (Pet. App. A 1a). The court of appeals affirmed the Tax Court's order *per curiam*, stating that it found no abuse of discretion in the denial of the motions (Pet. App. B 1a–2a).

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. In the form applicable when petitioners' motions were filed, Section 7481(1) of the Internal Revenue Code of 1954, Appendix, *infra*, p. 9, provided that a Tax Court decision became final if a petition for review was not filed within the time allowed therefor, and Section 7483, Appendix, *infra*, p. 9, specified that a petition for review had to be filed within three months of the date of decision. It is recognized, however, in Rule 13(a) of the Federal Rules of Appellate Procedure, Appendix, *infra*, pp. 9–10, that the running of the time for appeal is suspended by a motion to vacate or revise a decision which is timely filed under the Rules of Practice of the Tax Court. In turn, Rule 19(f) of the Tax Court's Rules of Practice, Appendix, *infra*, p. 10, provides that:

> No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

Accordingly, a motion to vacate a Tax Court decision is untimely and does not postpone the finality of the decision by suspending the running of the time for appeal if it is filed more than 30 days after the decision is entered. *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C.A. 5); *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243, 248 (C.A. 1); cf. *Morse* v. *United States*, 270 U.S. 151, 154. And, in the absence of a showing of fraud on the court, the Tax Court has no jurisdiction to vacate or modify its decisions after they have become final. *Lasky* v. *Commissioner*, 235 F. 2d 97 (C.A. 9), affirmed *per curiam*, 352 U.S. 1027; *R. Simpson & Co.* v. *Commissioner*, 321

U.S. 225; *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *Kegner* v. *Commissioner*, 387 F. 2d 689, 691 (C.A. 7).

In the case at bar, petitioners did not file their motions for leave to file motions to vacate until 90 days after the stipulated decisions were entered—two days before the appeal period would expire. They did not file petitions for review. Thus, the decisions became final three months from the date of decision. Petitioners have never alleged fraud on the court. It follows that the Tax Court had no jurisdiction to entertain petitioners' motions for leave to file motions to vacate the decisions.

2. Assuming *arguendo* that the Tax Court had jurisdiction, the court of appeals correctly held (Pet. App. 1-2a) that the denial of the motions did not constitute an abuse of discretion. It suffices, as the Tax Court noted (R. 107), that there was "no testimony whatsoever" that Kirsner's ailments affected his understanding of the settlement, and no affirmative evidence (apart from Kirsner's assertion) that he made his offer in settlement and executed the stipulated decisions under duress.

Petitioners contend, nevertheless, that the Tax Court committed reversible error in overruling their claim of the attorney-client privilege and allowing the attorneys who represented them in the Tax Court to

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Petitioners' motions for extension of time for appeal (R. 50), also filed two days before the period for appeal expired, could not be treated as petitions for review since they did not evidence a present and unequivocal intention to appeal. 9 Moore's *Federal Practice* (2d ed.), par. 203.09.

testify that they explained to Mr. Kirsner the interest factor in the settlement. This was not error, much less prejudicial error.

It is well-settled, as stated in 8 Wigmore, *Evidence* (McNaughton rev. 1961), § 2327, that: "[w]hen the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue." Thus, this Court held in *Hunt* v. *Blackburn*, 128 U.S. 464, 470–471, that when the client there involved "entered upon a line of defense which involved what transpired between herself and [her attorney], and respecting which she testified, she waived her right to object to his giving his own account of the matter." This rule of evidence is applied in the District Court for the District of Columbia (*United States* v. *Wiggins*, 184 F. Supp. 673), and is therefore made specifically applicable in Tax Court proceedings by Rule 31 of the Tax Court's Rules of Practice, Appendix, *infra*, p. 10. None of the decisions invoked by petitioners (Pet. 10–11) is in derogation of the rule, as appears from petitioners' own summary of them.

Mr. Kirsner testified that petitioners' attorneys in the Tax Court did not explain the interest factor to him, and that he was in disagreement with them generally over the terms of settlement (R. 78–80). Under the established rule he thereby waived the attorney-client privilege which might otherwise have precluded the attorneys from testifying about these matters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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GRANT W. WIPRUD,
MARY MCGINN,
Attorneys.

MARCH 1972.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)):

SEC. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(1) *Timely petition for review not filed.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

* * * * * *

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

Federal Rules of Appellate Procedure:

RULE 13

(a) *How Obtained; Time for Filing Notice of Appeal.* * * *

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order dispos-

ing of such motion, or from the entry of decision, whichever is later.

* * * * * * *

Rules of Practice, United States Tax Court (Rev. 1958, 1971 ed.):

RULE 19. MOTIONS

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(f) No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

* * * * * *

RULE 31. EVIDENCE AND THE SUBMISSION OF EVIDENCE

(a) *Rules applicable.*—The trials before the Court and its Divisions will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia.

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FILED
MAY 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1007

REGENCY REALTY, ET AL.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of April 17, 1972, denying the petition for writ of certiorari, in No. 71-1007, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed February 7, 1972.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. In its petition for a writ of certiorari, petitioners noted a direct conflict of authority concerning the treatment of the attorney-client privilege. Two recent decisions have exacerbated this conflict, thus evincing that this question is of such large practical importance that it should be entertained by this Court.

In *United States v. Schoeberlein*, 335 F. Supp. 1048 (D. Md. 1971) the government was successful in compelling Schoeberlein, an accountant-attorney, to produce the tax records of his client. The court held that the privilege had been lost because the records had been shown to a government agent on a prior occasion. However, in *Richardson v. Hamilton Int'l Corp.*, 333 F. Supp. 1049 (E.D. Pa. 1971), the court upheld the client's claim of the attorney-client privilege by denying a shareholder's derivative suit against the corporation because the shareholder was also an attorney who had done extensive legal research for the corporation. The court noted at p. 1051 that:

> "No authority need be cited for the proposition that an attorney may not participate in litigation if his participation would violate his ethical duty to a former client."

Therefore, a taxpayer who obtains the assistance of counsel in tax litigation is confronted with squarely contrary holdings on the question of what duty his attorney owed to him in keeping pertinent matters confidential. Unless this conflict is resolved, an unjustifiable discrimination between persons in different jurisdictions will result.

2. Rule 58 of the Supreme Court allows a petition for rehearing to state other substantial grounds available to petitioner although not previously presented. In *United*

States v. Walker, 217 F. Supp. 828 (D. S.C. 1963), it was held that no assessment of a deficiency in respect of the tax imposed by this chapter (income tax) shall be made until the decision of the Tax Court has become final. Petitioners maintain that they were assessed a deficiency before the finality of a Tax Court order and were thus deprived of their constitutional rights.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

FELIX S. JACOB,
Counsel for Petitioners.

May, 1972.

CERTIFICATE OF COUNSEL

I hereby certify that the aforegoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

FELIX S. JACOB,
Counsel for Petitioners.